

1993

State of Utah v. Jamie Lee Moreno : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 930009-CA
JAMIE LEE MORENO, : Priority No. 2
Defendant/Appellant.:

BRIEF OF APPELLEE
- - - - -

APPEAL FROM A CONVICTION FOR POSSESSION OF A
CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY,
IN VIOLATION OF UTAH CODE ANN. § 58-37-
8(2)(a)(i) (1990), IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
UTAH, THE HONORABLE JAMES S. SAWAYA,
PRESIDING.

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DOCKET NO. 930009

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FILED
Utah Court of Appeals

MAR 04 1994


Mary T. Noonan
Clerk of the Court

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BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1990). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992).

STATEMENT OF THE ISSUE ON APPEAL AND

STANDARD OF APPELLATE REVIEW

1. Was the officer's seizure of a paper bindle from the front seat of defendant's car based on both probable cause and exigent circumstances, the two requirements of the automobile exception to the warrant requirement?

Although the Utah Supreme Court has held that a trial court's determination of whether probable cause existed is reviewed under a clearly erroneous standard, State v. Rocha, 600 P.2d 543, 545 (Utah 1979) (applying clearly erroneous standard in reviewing trial court's determination that officer had probable cause to arrest defendant), its recent discussion of standard of review as applied

to reasonable suspicion suggests that it will adopt a similar stance with respect to probable cause determinations:

[A] trial court['s] determination of whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is reviewable nondeferentially for correctness, as opposed to being a fact determination reviewable for clear error. [However,] the reasonable-suspicion legal standard is one that conveys a measure of discretion to the trial judge when applying that standard to a given set of facts. Precisely how much discretion we cannot say, but we would not anticipate a close, de novo review. On the other hand, a sufficiently careful review is necessary to assure that the purposes of the reasonable-suspicion requirement are served.

State v. Pena, No. 930101, slip op. at 9-10 (Utah February 15, 1994) (footnotes omitted).

The determination of whether exigent circumstances were present is a factual question and should not be disturbed on appeal unless it is clearly erroneous. State v. Morck, 821 P.2d 1190, 1194 (Utah App. 1991) (citing State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987)). Whether this standard will be reevaluated in light of State v. Pena remains to be seen.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 14 of the Utah Constitution states:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

STATEMENT OF THE CASE

After a hearing in which the trial court denied his motion to suppress, defendant entered into a plea bargain, presumably pursuant to State v. Sery, 758 P.2d 935 (Utah App. 1988) (R. 43, 62).¹ He was thereafter convicted of one count of possession of a controlled substance, cocaine, a third degree felony (R. 49). The court stayed the execution of a prison sentence and placed defendant on 24 months probation, on condition that he serve 90 days in the Salt Lake County Jail and fulfill other educational and rehabilitative objectives (R. 49-50). Defendant subsequently filed this timely appeal (R. 53).

STATEMENT OF THE FACTS

On the evening of October 23, 1991, defendant approached a woman on Main Street in Salt Lake City and offered her \$35.00 to "party" with him (R. 73). The woman, who was acting as a police decoy, agreed and told defendant to follow her in his car (R. 72-73). When they arrived at the parking lot of the nearby Colonial Hotel, defendant got out of his car and locked it (R. 73).

¹ The only evidence attesting to the nature of the plea is found in the certificate of probable cause, which states: "It is hereby ordered that a Certificate of Probable Cause may issue in the appeal in the above matter and the plea herein has been accepted as conditional" (R. 62). At no point in the record is Sery referenced.

Meanwhile, two Salt Lake City police officers, working the undercover operation with the decoy, also pulled into the parking lot, one in front of and one following defendant's vehicle (R. 78, 83). Officer Harris approached defendant, arrested him for soliciting, handcuffed him, searched him, and placed the items found in the search, including defendant's car keys, on top of defendant's vehicle. Harris then accompanied defendant into a police car, where he began writing out a citation (R. 78, 83-84).

Following the arrest, Officer Jackson, who was also on the scene, approached defendant's car, looked through the window, and saw "a folded bindle, the type you carry cocaine in" located on the passenger side front seat (R. 79, 84). Jackson walked over to Officer Harris, who was sitting in the patrol vehicle with defendant, and said, "I want you to come back and witness this" (R. 79). Jackson pointed out the bindle on the front seat to Harris and then, taking the keys off the car roof, unlocked the vehicle, and removed the bindle. It contained a white powder, which field-tested positive for cocaine (R. 79).

SUMMARY OF ARGUMENT

The police officers' entry into defendant's car in order to effectuate the seizure of evidence in open view was constitutionally lawful because it fulfilled both requirements of the automobile exception to the warrant requirement.

The first element, probable cause, was established when the officer, prior to making any intrusion, observed a paper bindle through the car window in open view on the front seat of

defendant's car. The officer's observation of a distinctively configured piece of evidence was sufficient to establish probable cause that the bindle was associated with criminal activity.

Second, the location of the evidence, presenting an obvious invitation to theft and subsequent destruction of the evidence, as well as protection of the public from access to the drugs, created the exigent circumstances necessary to seize the evidence immediately.

ARGUMENT

THE OFFICERS' WARRANTLESS ENTRY INTO DEFENDANT'S CAR AND SEIZURE OF INCRIMINATING EVIDENCE IN OPEN VIEW WAS LAWFUL: THE OFFICERS' OBSERVATION OF THE BINDLE PROVIDED PROBABLE CAUSE TO EFFECTUATE THE SEIZURE; PREVENTING DESTRUCTION OF THE EVIDENCE AND PROTECTING THE PUBLIC FROM ACCESS TO THE DRUGS CONSTITUTED THE EXIGENT CIRCUMSTANCES NECESSARY TO SECURE THE BINDLE IMMEDIATELY.

A warrantless search or seizure will be unreasonable per se under federal or state law unless it falls within one of the specifically delineated exceptions to the warrant requirement. State v. Larocco, 794 P.2d 460, 470 (Utah 1990); Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). In Utah, in order to fulfill the requirements of the automobile exception to the warrant requirement, the State must establish both probable cause and exigent circumstances. State v. Morck, 821 P.2d 1190, 1193 (Utah App. 1991).

The gist of defendant's undeveloped argument appears to be

two-fold.² First, the folded paper bindle that the officers observed on the front seat of defendant's locked car was insufficient to establish probable cause to open the car door and seize the evidence. Thus, the acts of unlocking and opening the car door constituted an unlawful search. And second, even assuming probable cause arguendo, no exigent circumstances existed to justify seizure of the bindle without a warrant (Br. of App. at 3-4).

As to defendant's first contention, probable cause to open the car door and remove the evidence was established as soon as the officer, prior to making any intrusion, simply observed the bindle in open view on the front seat through the car window.³ State v. Harris, 671 P.2d 175, 181 (Utah 1983). At this point, no search had occurred, defendant had no expectation of privacy in the

² At the suppression hearing, defense counsel referred to State v. Hygh, 711 P.2d 264 (Utah 1985) (Zimmerman, J., concurring), and Larocco, but failed to engage in any meaningful legal analysis of those cases (R. 87-88). Similarly, on appeal, defense counsel cites to those cases, but fails to analyze the specific facts of the instant case in light of the law established by its predecessors. Under the circumstances, this court may choose to assume the correctness of the judgment below without addressing the merits. See, e.g., State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Sterger, 808 P.2d 122, 125 n.2 (Utah App. 1991); English v. Standard Optical Co., 814 P.2d 613, 618-19 (Utah App. 1991). Nonetheless, because defendant has minimally raised an issue both in the trial court and on appeal, the State will address it on the merits, leaving the judgment call as to the adequacy of the briefing to this Court.

³ The open view doctrine applies to preintrusive police observation, such as is present in this case. In contrast, the plain view doctrine is postintrusive, coming into play only when a lawful search is already underway. See State v. Harris, 671 P.2d 175, 181 (Utah 1983); Texas v. Brown, 460 U.S. 730, 738, n.4 (1983) (opinion of Rehnquist, J.).

contraband, and the federal and state guarantees against unreasonable searches and seizures had not yet come into play.

As the United States Supreme Court observed in a case involving a police officer who stopped a vehicle, saw a partially concealed balloon, and then shifted his position to get a better view: "The general public could peer into the interior of [defendant's] automobile from any number of angles; there is no reason [the police officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy." Texas v. Brown, 460 U.S. 730, 740, 103 S.Ct. 1535, 1542 (1983) (plurality).

The view of the Utah Supreme Court is consistent with the federal position:

The constitutional interests protected by the prohibition against unlawful searches do not require the police to be less observant than the average person. Nor must a police officer avert his gaze from contraband because a criminal wishes to avoid detection. A desire to avoid detection of criminal activity does not ipso facto give rise to a protectable privacy interest.

Thus, an officer is not expected to ignore what is exposed to observation from a position where he is lawfully entitled to be, and he may view the interior of a vehicle from such a position. That does not constitute a 'search' within the meaning of the constitutional provisions.

State v. Lee, 633 P.2d 48, 51 (Utah) cert. denied, 454 U.S. 1057, 102 S.Ct. 606 (1981) (citations omitted).

Furthermore, the distinctive configuration of the folded paper

justified the officer's belief that it contained contraband.⁴ State v. Cole, 674 P.2d 119, 124 (Utah 1983). "Some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Arkansas v. Sanders, 442 U.S. 753, 764 n.13, 99 S.Ct. 2586, 2593 (1979). Indeed, this Court has specifically held, in the context of the plain view exception to the warrant requirement, that observation of a plainly visible paper bindle discovered in the course of an administrative search is "clearly incriminating." State v. Cornwall, 810 P.2d 484, 488 (Utah App. 1991). Under the circumstances of this case, the officers' observation of the incriminating evidence in open view provided the necessary probable cause to enter the vehicle in order to seize it.

⁴ On appeal, defendant argues that "there was insufficient foundation that the paper [the officer] saw contained an illicit substance" (Br. of App. at 4). At trial, defense counsel made one foundational objection to Officer Jackson's testimony, which was overruled (R. 81). Officer Jackson testified without further objection, and then Officer Harris testified without any objection. Although inartfully expressed, the gist of defense counsel's closing argument and his argument on appeal was that the officers' testimony was insufficient to establish probable cause. The testimony of the officers, however, plainly established the probable cause prong of the automobile exception. Officer Jackson testified that he had seen numerous bindles of the type found in defendant's car during his three year assignment with Metro Narcotics and that many of those bindles contained cocaine (R. 80-82). Officer Harris testified that he had also been assigned to narcotics and had "run into" bindles several times in his other assignments (R. 84). He also described in detail the characteristics of the "pharmaceutical fold" used in constructing a bindle (R. 85-86).

Defendant relies on State v. Larocco for the proposition that the police officer's actions of unlocking and opening the car door constituted an unlawful search.⁵ Plainly, just as in Larocco, defendant here had an expectation of privacy in the interior of his automobile. As the United States Supreme Court has stated: "[A] car's interior as a whole is . . . subject to Fourth Amendment protection from unreasonable intrusions by the police." New York v. Class, 475 U.S. 106, 114-15, 106 S.Ct. 960, 966-67 (1986).

Here, the officers had probable cause to seize the incriminating evidence prior to entering the vehicle, just as the law established by Larocco requires. The action here did not reveal any new information, but instead only secured the item for which probable cause to seize already existed. Indeed, the officers' actions can be more reasonably characterized as an entry into a constitutionally-protected area necessary to effectuate a seizure. This distinguishes it from a search, which implies looking in an effort to find or discover something and which "compromises the individual interest in privacy." Horton v.

⁵ Defendant cites only to the Utah Court of Appeals opinion, ignoring entirely the subsequent opinion from the Utah Supreme Court. Compare State v. Larocco, 742 P.2d 89 (Utah App. 1987) with State v. Larocco, 794 P.2d 460 (1990). Furthermore, Larocco was a plurality opinion. As this Court has noted: "The precedential value of the Larocco rationale is somewhat unclear . . . because Justice Durham's reasoning was joined only by Justice Zimmerman. Justice Stewart concurred in the result, but provided no insight into his rationale. Because he concurred only in the result, and because Justice Durham arrived at the result by using state constitutional analysis, it is possible that Justice Stewart arrived at his conclusion strictly through a Fourth Amendment approach." State v. Strickling, 844 P.2d 979, 985 n.2 (Utah App. 1992).

California, 496 U.S. 128, 133 (1990); See State v. Echevarrieta, 621 P.2d 709, 710 (Utah 1980).

Nonetheless, probable cause alone will not suffice to justify a warrantless seizure. Morck, 821 P.2d at 1193; Larocco, 794 P.2d at 470. In addition, the State must show that exigent circumstances justified the officer's seizure of the bindle without first obtaining a search warrant. Ibid. In this case, the car was parked in the parking lot of a hotel apparently frequented by prostitutes. This Court can take judicial notice of the fact that drug use is often associated with prostitution. Utah R. Evid. 201. See also State v. Hayes, 860 P.2d 968, 972 (Utah App. 1993) (witness was both a drug addict and a prostitute); State v. Taylor, 599 P.2d 496, 497 (Utah 1979) (defendant supported her drug addiction through prostitution); State v. Jones, 585 P.2d 445, 446 (Utah 1978) (same). The bindle was on the front seat of the car, in open view of anyone who happened to be in the parking lot. Under such circumstances, it represented an obvious invitation to theft and subsequent destruction of the evidence. Prevention of destruction of the evidence, as well as protection of the public from access to the drugs, created the exigencies that justified the immediate warrantless seizure of the bindle. Morck, 821 P.2d at 1193; Larocco, 794 P.2d at 469-70 (and cases cited therein).

The officer's warrantless entry into the vehicle in order to seize the bindle complied with constitutional strictures. The trial court, however, failed to make any findings of fact in impliedly reaching this conclusion and denying defendant's motion

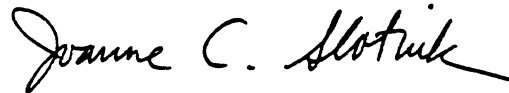
to suppress.⁶ Nonetheless, on appeal, "this court upholds the trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings." State v. Ramirez, 817 P.2d 775, 788 n.6 (Utah 1991). In this case, because the trial court's denial of defendant's motion to suppress emerges from an essentially undisputed factual record, this Court may reasonably infer the necessary findings to support the trial court's conclusion. Id.

CONCLUSION

For the reasons stated, this Court should affirm the decision of the trial court.

RESPECTFULLY submitted this 4th day of March, 1994.

JAN GRAHAM
Attorney General



JOANNE C. SLOTNIK
Assistant Attorney General

⁶ After hearing the evidence at the suppression hearing, the court took the matter under advisement (R. 88-89). A subsequent minute entry states only: "The court having considered and now being fully advised in the premises orders said motion denied" (R. 34).

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of Appellee were mailed first class, postage prepaid, to Aric Cramer, 4535 So. Van Gordon Way, Morrison, Colorado 80465, this 4th day of March, 1994.

Joanne C. Motnick

ADDENDUM

1 March 20, 1993

2 THE COURT: Call the matter of State vs. James
3 Moreno, Defendant's Motion to Suppress. The record may
4 show that defendant is present with counsel John Bucher;
5 Mr. Vuyk appearing for the state.

6 MR. BUCHER: I would like to call the defendant
7 to the stand.

8 THE COURT: That's not how we proceed usually,
9 is it?

10 MR. VUYK: When we have police officers--I don't
11 know if they are back yet. They had to run over to a
12 trial.

13 THE COURT: Your motion places the burden on the
14 state.

15 MR. BUCHER: I couldn't see them out there. I
16 saw them earlier--

17 MR. VUYK: They will be back momentarily. If he
18 wants to proceed out of order, that's fine.

19 JAMES MORENO

20 Called as a witness, having been first duly sworn,
21 was examined and testified as follows:

22 DIRECT EXAMINATION

23 MR. BUCHER:

24 Q Would you state your name and address?

25 A James Moreno. 5447 Breckenridge Road.

1 Q Are you the defendant in this action?

2 A Yes, I am.

3 Q I would like to call your attention to October
4 23, 1991, and ask if you have had occasion to come in
5 contact with any police officers at that time?

6 A Yes, I did.

7 Q What time was that, if you recall?

8 A About 8 p.m.

9 Q How did you come in contact with them? Where
10 were you?

11 A I was at 14th South and State Street. Actually
12 I came--it was 14th Street and Main.

13 Q In what city?

14 A Salt Lake City.

15 Q What occurred at that location?

16 A They said I was under arrest for prostitution,
17 for soliciting.

18 Q Is that the first time you came in contact with
19 the police officers that day?

20 A Yes.

21 Q Did you come in contact with an undercover
22 officer prior to coming in contact with the police
23 officers?

24 A Yes. That would be the one that so-called
25 "solicited".

1 Q When was that?

2 A On the same day, eight o'clock.

3 Q And where was that?

4 A 14th Street and State.

5 Q What occurred at that time?

6 A A girl was out there. I pulled up, and I was
7 headed to a party. And I asked her if she wanted to go
8 party. She said she was working. I said I would give her
9 thirty-five dollars to go with me and party.

10 Q And what occurred after you said that?

11 A She then told me she would, to follow her in her
12 car, that we could party over at some hotel or something.
13 And I followed her, and when we got over there, she got out
14 of her vehicle. I got out of mine. I locked it, and all
15 of a sudden, I had officers flashing badges and telling me
16 to get back in my car.

17 Q Where were you at this occasion?

18 A At a hotel on 14th Street and State. I don't
19 remember the name of the hotel.

20 Q What did they say to you when they approached
21 you?

22 A To get back in my car, and I said, no.

23 Q What did they do then?

24 A Told me I was under arrest. I said, "For what?"
25 And they told me for soliciting. I said, "I didn't

1 solicit. I didn't solicit nobody." Then they told me to
2 put my keys on the car and cuffed me and asked if they
3 could go inside my car. I said, "No." They asked me if I
4 was hiding something. I said, "No." I just didn't want
5 them in my car.

6 Q Where were you standing in relation to the
7 automobile when this conversation was going on?

8 A Away from it, until they made me walk back up to
9 it on the back.

10 Q What occurred then?

11 A I was placed in a vehicle with cuffs on. Then
12 they walked up and started the light in the cars. They
13 said, "I think he has something to hide or something.
14 Maybe that's a bindle or something." They seen something,
15 a piece of paper or something and said, "Well, I think that
16 is reasonable doubt," or whatever. So they got my keys,
17 unlocked it, went through it, came back out, said I was
18 under arrest for coke--possession.

19 Q Did they ask you for your consent to perform the
20 search a second time?

21 A Second time, yes.

22 Q How many times did they ask you if they could
23 search your vehicle?

24 A About two other times.

25 Q What did they say?

1 A "Are you some kind of lawyer? Do you know
2 something we don't? We have a right to go in there." I
3 said, "Well, I can't stop you. You are cops and stuff."

4 Q Where was your vehicle parked in relation to the
5 other automobiles at the motel?

6 A Against the pool, facing north.

7 Q Was it parked in the regular place where
8 vehicles park for the motel or parked in some other place?

9 A There were other vehicles parked around the pool
10 area, so I would say so.

11 Q Was it obstructing the lane of traffic inside
12 the motel?

13 A No.

14 Q What vehicle was that, that you are talking
15 about?

16 A '78 Datsun station wagon.

17 Q Are you the owner of that vehicle?

18 A Yes.

19 Q Is it registered in your name?

20 A Yes, it is.

21 Q Thank you.

22 CROSS-EXAMINATION

23 BY MR. VUYK:

24 Q You indicated that police officers asked you
25 twice to look at your car?

1 A Look inside, yes.

2 Q Isn't it a fact that they indicated to you they
3 saw a bindle in plain view on the front seat of the car?

4 A No.

5 Q Did you make any statement to them with regard
6 to the cocaine?

7 A No.

8 Q You never told them it was cocaine for your own
9 personal use?

10 A Not until afterwards I said it is cocaine.

11 Q How long afterwards?

12 A Way after I was arrested. They brought it and
13 showed me and was taking pictures of me, and stuff like
14 that.

15 Q Now, you indicate that you were under arrest,
16 and you were handcuffed and you were in a police car; is
17 that right? Any question in your mind?

18 A With the strap across me.

19 Q A strap across you? You were under arrest and
20 had the cuffs on?

21 A Yes.

22 Q That's all I have.

23 THE COURT: Anything further.

24 MR. BUCHER: Nothing.

25 THE COURT: You may step down.

1 MR. VUYK: I would like to call Officer Harvey
2 Jackson.

3 HARVEY JACKSON

4 Called as a witness, having been duly sworn,
5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 MR. VUYK:

8 Q Would you state your name?

9 A Harvey Jackson.

10 Q Your occupation?

11 A Police officer for Salt Lake City.

12 THE COURT: First name?

13 THE WITNESS: Harvey.

14 MR.VUYK: What is your current assignment?

15 A I am currently assigned to burglary.

16 Q In October of last year, what were you assigned
17 to?

18 A Special investigations and vice.

19 Q And on that occasion, did you have an
20 opportunity to come in contact with a James Moreno?

21 A Yes.

22 Q How did that come about?

23 A Mr. Moreno made a deal with one of our decoys,
24 followed her back to the Colonial Hotel. We followed him
25 back to the hotel.

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1 Q How did your contact come about?

2 A We followed his vehicle to the hotel by the
3 swimming pool area. Detective Harris was behind them with
4 some emergency equipment on. I went around to the other
5 side of the swimming pool and pulled in front of Mr.
6 Moreno's vehicle.

7 Q What happened then?

8 A Mr. Moreno got out, locked his door, stood
9 there, basically said something like, "You know, what is
10 going on, what's happening?"

11 Q What happened then?

12 A Detective Harris walked up, told him he was
13 under arrest for soliciting sex, handcuffed him, took him
14 back to his car.

15 Q Did you, in fact, search him at that time?

16 A Detective Harris did, yes.

17 Q Where did that search take place?

18 A Beside Mr. Moreno's car.

19 Q What was found on him at that time?

20 A He had some car keys, some cash and coins, that
21 type of thing.

22 Q Where were they put?

23 A On the roof of the car.

24 Q Was Mr. Moreno then removed from that area?

25 A Yes, sir.

1 Q Did you then inspect the car at all?

2 A I walked back to the car, looked inside.

3 Q What did you see?

4 A On the passenger side there was, I believe, a
5 dark-colored, maybe black-colored cassette holder. In
6 front of that looked like a folded bindle, the type you
7 carry cocaine in. I went back to Detective Harris and
8 said, "I want you to come back and witness this." He
9 walked back with me. I took the keys off the roof of the
10 car, unlocked it, went inside the vehicle.

11 Q What did you then find?

12 A I reached down, grabbed the folded paper. It
13 was a bindle, unfolded, with some white powder in it. I
14 gave it to Detective Harris. He did a field test on it.
15 It tested positive for cocaine.

16 Q Did you have a conversation with the defendant
17 after that?

18 A I did not.

19 Q When you looked into the car, was this bindle in
20 plain view?

21 A Yes, it was.

22 Q Was the defendant under arrest at the time?

23 A Yes, he was.

24 Q That's all I have.

25 CROSS-EXAMINATION

1 BY MR. BUCHER:

2 Q Officer Jackson, do you have it with you?

3 A I beg your pardon?

4 Q Do you have the thing, described as a "bindle"
5 here with you?

6 A No.

7 Q What did it look like?

8 A It was a folded piece of paper, looked like a
9 piece of magazine or something just folded the way they
10 folded bindles.

11 Q Well, how big was it?

12 A Probably about that size, maybe an inch and a
13 half.

14 Q And inch and a half square. Could you see
15 inside?

16 A No, sir, it was colored paper.

17 Q Colored?

18 A Well, like magazine, like it wasn't clear. You
19 couldn't see inside.

20 Q Looked like it came from a magazine?

21 A That's what it looked like, yes, sir.

22 Q Thank you.

23 REDIRECT EXAMINATION

24 BY MR. VUYK:

25 Q Are you acquainted with this type of bindle?

1 A Yes, sir.

2 Q How do you have that acquaintance?

3 A I have seen bindles many times. I was assigned
4 to Metro Narcotics for three years.

5 Q During that period was this the type of bindle
6 you normally found?

7 A Yes, sir.

8 MR. BUCHER: Object. Move to strike. I don't
9 think there's enough foundation as to his expertise.

10 MR. VUYK: He testified he's been a narcotics
11 officer for two years.

12 THE COURT: Overruled.

13 MR. VUYK:

14 Q Is this the type normally found?

15 A Yes, sir.

16 Q And it was folded in a manner you normally
17 found?

18 A Yes, sir.

19 Q That's all.

20 RE CROSS-EXAMINATION

21 BY MR. BUCHER:

22 Q How many bindles have you seen in your two years
23 as a narcotics officer?

24 A I couldn't give you a number, quite a few.

25 Q Over ten?

1 A Yes, sir.

2 Q And out of these bindles, that you have seen,
3 how many have been of this kind of paper?

4 A I couldn't give you a number on that.

5 Q Of the number that you have seen, of this kind
6 of paper, how many of them did it later--was it later
7 established in court it had a controlled substance inside
8 of it?

9 A That's difficult to say, sir.

10 Q Thank you.

11 THE COURT: Mr. Vuyk, anything further?

12 MR. VUYK: One question. Were there a lot of
13 them wrapped that way that had cocaine in?

14 THE WITNESS: Yes.

15 THE COURT: You may step down.

16 MR. VUYK: Call Officer Harris.

17 DAVID HARRIS

18 Called as a witness, having been first duly sworn,
19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. VUYK:

22 Q Would you state your name?

23 A David Harris.

24 Q Occupation?

25 A Police officer with Salt Lake City.

1 Q Your present assignment?

2 A Special investigations, the vice unit.

3 Q Were you so involved in October of last year?

4 A Yes, I was.

5 Q Did you come in contact in October, I believe
6 about the 23rd, with Mr. Moreno?

7 A Yes.

8 Q How did that come about?

9 A We were working a decoy operation. One of the
10 police decoys had made a soliciting sex deal with Mr.
11 Moreno. I followed his vehicle to the Colonial Hotel
12 parking lot. The vehicle entered the parking lot. I
13 engaged my emergency equipment to stop the vehicle. After
14 following the vehicle for a little ways, Officer or
15 Sergeant Jackson pulled in front of it. The vehicle
16 stopped. Mr. Moreno exited the vehicle.

17 Q What did you do then?

18 A I approached Mr. Moreno, placed him under arrest
19 for soliciting sex.

20 Q Did you handcuff him?

21 A Yes.

22 Q Did you search him?

23 A Yes.

24 Q What did you do with the items you found on him?

25 A I placed them on top of one of the cars--whether

1 it was mine or his. Mine was directly behind his.

2 Q What did you do then?

3 A Placed him in my vehicle, passenger's side, sat
4 down next to him, began to write him a citation.

5 Q He was in handcuffs at that time?

6 A Yes.

7 Q What happened then?

8 A Sergeant Jackson approached me and told me that
9 he had something he wanted me to witness in Mr. Moreno's
10 vehicle. I got out of the car, and Sergeant Jackson
11 pointed out the folded paper bindle, that was discussed
12 earlier, sitting on the car's front seat.

13 Q What did it appear to be to you?

14 A Folded bindle, pharmaceutical-type fold, orange
15 in color.

16 Q What do you mean by pharmaceutical type?

17 A That's what I have been told the fold on a
18 bindle is called--a "pharmaceutical" type.

19 Q Have you had any experience with these bindles?

20 A Yes.

21 Q In what capacity?

22 A I have been assigned also to narcotics and run
23 into them several times in patrol in my other assignments.

24 Q They have a special fold, the way they are
25 folded?

1 A Yes.

2 Q This particular item was folded that way?

3 A Yes. It was folded in a little--in a square.

4 Q And what did you do then?

5 A I watched Sergeant Jackson open it. It
6 contained a white powder. I took that, and I had field
7 test kits for cocaine. I tested it. It tested positive.

8 Q What did you do then?

9 A Placed it into evidence, eventually.

10 Q What did you do. Did you have any further
11 conversation with Mr. Moreno?

12 A Yes, Mr. Moreno--just as I was beginning to test
13 it, stated, "It is cocaine." And at some point, I don't
14 recall when--when I was discussed it, talking with him, he
15 said, "I am not a dealer. It was for his private use."

16 Q That's all I have.

17 CROSS-EXAMINATION

18 BY MR. BUCHER:

19 Q Officer Harris, what is a pharmaceutical fold,
20 again?

21 A The paper is folded over several times so
22 that--I don't know how to describe it. But it folds a
23 small square piece of paper so it can hold a piece of
24 paper.

25 Q Is that it's only characteristic? It is folded

1 into a small square piece or is it folded in a particular
2 way besides that? Let me rephrase it, if you didn't
3 understand it.

4 A I understand.

5 Q Is the only way you could tell it was a
6 pharmaceutical fold is because it was folded into a square?

7 A No.

8 Q Would you tell me the other reasons you could
9 tell it was a pharmaceutical fold?

10 A It looked like the fold that I have seen, that's
11 been described to me as a pharmaceutical fold on a bundle.

12 Q Would you tell me what that is, by size, the
13 square shape?

14 A I could describe how it is folded.

15 Q Would you?

16 A You get a square, and you fold it so that it
17 makes a triangle. Then you fold the edges over. Then you
18 fold the top, then tuck it into the--it is hard--fold the
19 top over so it tucks into the bottom.

20 Q Is the size of this tucking, the fact it was a
21 square--is there any other characteristic so I could call
22 it a pharmaceutical fold?

23 A No.

24 Q Thank you.

25 MR. VUYK: Nothing further.

1 THE COURT: Step down. Is that all the
2 evidence?

3 MR. VUYK: That's all I have.

4 THE COURT: What are you claiming, Mr.
5 Vuyk--plain view?

6 MR. VUYK: That is right, Your Honor. The
7 individual was under arrest, had been searched. It was in
8 plain view.

9 MR. BUCHER: Your Honor.

10 THE COURT: This case that you handed me, it is
11 a rather lengthy opinion.

12 MR. BUCHER: Would you look--the first part of
13 it has to do with, I believe, a plea bargain and
14 evidentiary problem. Page 16, I believe, begins the
15 discussion of search and seizure in State vs. Hyde. I will
16 not impose upon Your Honor to read it or even tell you what
17 it says. But here is what I think it says. It says that
18 in Mr. Lorroco's case, he wants to change the search and
19 seizure law of automobile. I believe what this case stands
20 for, if you see something inside a vehicle and exigent
21 circumstances exist, you go obtain a warrant for it. If
22 they saw what was obviously in plain view--a knife, a body,
23 a syringe, contraband--if they saw a crime or contraband
24 leading to a crime inside of a vehicle, that's what plain
25 view is. Looking in there and seeing a folded up piece of

1 paper I don't believe is plain view. I believe it is
2 reason to believe that maybe something has happened, and it
3 could be probable cause to obtain a search warrant. But in
4 my view of this case, Lorroco, his predecessor case cited
5 in Lorroco, State vs. Hyde, if my interpretation is
6 correct, the officers looked in there. They needed to go
7 get a search warrant. I don't think it is probable cause
8 to see a folded up piece of paper in someone's car. I
9 think it was an excuse to search it. I think that is up to
10 a magistrate, a committing magistrate, who has the decision
11 to obtain a warrant. This man was not going anywhere. He
12 was under arrest. There was none of the problems that
13 Lorroco talked about, about reaching for a gun before
14 destroying evidence.

15 MR. VUYK: It is clear it falls under the cases
16 where there was a legal lawful arrest. They have a right
17 to look at the car and search it to determine whether, in
18 fact, there are any weapons or any other type of thing.
19 This is the entire process the officers had reason to be
20 suspicious when he jumped out of the car and locked it.
21 They were surrounded at the time. All this leads to the
22 question of what could be done. Certainly, we feel that
23 this was appropriate, proper, and done in the process of an
24 arrest.

25 THE COURT: Let me read this case. I will have

1 you a ruling within a day or two.
2 (whereupon the hearing was concluded)

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5 CERTIFICATE OF COURT REPORTER

6 THE STATE OF UTAH)

7 COUNTY OF SALT LAKE)
8
910 I, Cathy Gallegos, Registered Professional
11 Reporter, residing in Salt Lake City, Utah, do hereby
12 certify that the above and foregoing printed pages contain
13 a full, true and correct transcription of my shorthand
14 notes taken upon the occasion set forth in the caption
15 hereof, transcribed by me or under my supervision,
16 by means of computer transcription.17 Witness my hand, this 31st day of May, 1993.
1819
20 
21 Cathy Gallegos, CSR, RPR
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